Filed 11/18/03 Adoption of B.A. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of B.A., a Minor.	
J.C., Petitioner and Appellant, v. E.A., Objector and Respondent.	E032068 (Super.Ct.No. RIA017214) **OPINION**

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed.

Covington & Crowe, Donald G. Haslam, and Khymberli S. Apaloo for Petitioner and Appellant.

Joseph T. Tavano, under appointment by the Court of Appeal, for Objector and Respondent.

Kathleen Murphy Mallinger, under appointment by the Court of Appeal, for Minor.

J.C. (Stepfather) appeals from the trial court's order denying Stepfather's petition to free B.A. (Minor) from the parental custody and control of Minor's natural father, E.A. (Father).[1] The court denied the petition on the ground there was not clear and convincing evidence Father intended to abandon Minor. We find substantial evidence to support the court's ruling and affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *August 1998 Dissolution Judgment*

Minor was born to Father and W.C. (Mother) in 1993. Father and Mother were at one time married but dissolved their marriage in August 1998. Joint legal custody of Minor was awarded to both parents, with primary physical custody to Mother. Father was granted visitation consisting of alternate weekends, two weeks' vacation per year, and specified holidays.

The judgment of dissolution required each parent to keep the other advised at all times of his or her residence address and home and work telephone numbers. It also provided that each parent would have open telephonic access to Minor at reasonable times and for reasonable durations.

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[1] Minor, through his appointed counsel, has requested that the trial court's decision be affirmed.

The judgment required Father to submit to random drug testing on demand by Mother. It provided that Mother was to advance any fees for the testing, subject to reimbursement if the test results were positive.

The judgment further required Father to pay child support of $484 per month and to pay $100 per month against previous child support arrearages of $5,444.

Finally, the judgment required Father to stay at least 100 yards away from Mother and her residence and work place, and from Minor's school, except for the purpose of picking up and delivering Minor for visitation.

Mother married Stepfather in late 1999 or early 2000.[2] Stepfather provided for Minor's support since the time of the marriage.

B. *Background of the Present Proceeding*

In November 2001, Father filed a report with the Riverside Police Department alleging Mother had violated his right of visitation. Father stated in the report that he had not seen Minor for approximately three and one-half years, since November 1998. The same month, Father also complained to the Orange County District Attorney about the matter.

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[2] The record does not indicate the month or year of the marriage. Stepfather states in his brief that the marriage occurred on September 25, 1999.

Also in November 2001, Father filed, in propria persona, an order to show cause seeking modification of the 1998 dissolution judgment to remove the random drug testing provision.[3]

In December 2001, Stepfather filed a petition for a stepparent adoption of Minor. The petition alleged Father had consented to the adoption.

Father filed, in propria persona, an objection to the adoption petition in March 2002. Father stated he did not consent to the adoption. He further stated that beginning in 1998 Mother had interfered with his efforts to contact Minor, first refusing to allow visitation and later refusing to allow telephone contact as well. According to Father, he eventually stopped calling because Mother and Stepfather threatened to get a restraining order and sue him for harassment. He had tried to reestablish contact with Minor over the years, but Mother had not allowed it.

Also in March 2002, Stepfather filed a petition pursuant to Family Code section 7822[4] to free Minor from the custody and control of Father. The petition alleged Father had failed to support or contact Minor since November 1998, with the intent to abandon Minor.

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[3] The order to show cause also stated Father was seeking modification of child custody, child support, and visitation, and an injunctive order, but did not state what relief was sought with respect to those issues.

[4] Further undesignated statutory references are to the Family Code.

C. *Evidence at Trial*

Stepfather's section 7822 petition proceeded to trial in June 2002. Most of the evidence at trial consisted of the testimony of Mother and Father. The parties agreed Father had no physical contact with Minor since November 1998 but, as would be expected, disagreed as to the reasons for this.

1. *Mother's testimony*

Mother testified that, after the August 1998 dissolution, the next time Father saw Minor was during Thanksgiving weekend 1998. Although Minor's birthday was that weekend, he did not receive a present from Father, and since then received no birthday or Christmas gifts, or cards, from Father.

Mother's next contact with Father was in November 1999, when she met Father at a restaurant to discuss visitation with Minor. Mother and Father agreed on a visitation plan that would begin with telephone calls and letters from Father to Minor and gradually proceed to visits, then overnight visits, and finally to normal visitation.

Father made telephone calls to Minor for a few weeks, but never began physical contact. Mother requested that Father get a drug test before beginning visitation, and in 1998 she posted funds at a laboratory to pay for the test, but Father failed to appear for the test.

Father did not contact Mother or try to see Minor in 1999 or 2000. He next contacted Mother by telephone in November 2001. He discussed child support but did not ask to see Minor. Father agreed to give up his parental rights to Minor if Mother

would forgive the child support he owed. Father had not paid child support from April 1999 to November 2001. In total, he owed about $30,000.

Mother prepared a document reflecting the parties' agreement and arranged to meet Father, but he cancelled the appointment. Mother had two more contacts with Father concerning the agreement. He did not ask to see Minor.

In December 2001, Father faxed a proposed agreement to Mother. At a court appearance in January 2002, however, Mother became aware Father was not going to sign an agreement.

Mother lived at the same address from the time of the dissolution until April 2001. She then moved but kept the same telephone number. She did not notify Father of her new address because he had not contacted her for so long.

2. *Father's testimony*

Father testified that after his last visit with Minor in November 1998, Mother said he could not see Minor, but could only talk to him by telephone. Father spoke to Minor on the telephone on a regular basis for another two months or so. At that point, Mother cut off all communication with Minor.

According to Father, "[I]t quickly got to the point where caller I.D. was installed on their phone, and once my number was recognized and the phone would just ring, and

the answering machine wouldn't even come on anymore."[5] Father also left numerous messages but never got any return calls.

Father stated that when he telephoned Mother's residence and spoke to Mother, Stepfather, or mother's sister, he would request visitation, but his requests for visitation and telephone contact were not granted. They would tell Father that Minor was not home. On one occasion when Father called, both Mother and Stepfather were at home, but Stepfather claimed Minor was not there and he did not know when minor would be back.

Father next contacted Mother around November 1999, to see if she would talk to him to reestablish visitation with Minor. They met at the restaurant, as Mother testified, and formulated a visitation plan. The plan called for Father to contact Minor by telephone for a period of time before beginning physical visitation. Father made telephone calls to Minor for about a month after the meeting. When Father spoke to Minor on the phone, Minor asked him why Mother would not let Father see Minor or pick him up. Father bought gifts for Minor but did not send them because he was afraid Mother and Stepfather would not give them to Minor and because he thought up through 1999 that he might be able to start seeing Minor again.

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[5] According to Mother, during 2001 she had caller identification on her cell phone, but not on her home phone.

Visitation was supposed to begin in December 1999, but Mother refused to allow it. She told Father she did not have to allow the visitation if she did not want to.

In or around January 2000, Mother said she wanted Father to undergo a drug test. Father said he was willing to take a test if Mother obtained an order from the court and paid for the test, but she refused. Father said he would get the drug test as soon as he could afford it.

Father paid for and took a drug test in May 2000, which was negative for all drugs. He offered the results to Mother, but she said it did not matter; she still was not going to let Father see Minor.

All of Father's contacts with Mother from November 1998 to November 2001 were by telephone, because the dissolution judgment required Father to stay away from Mother's residence other than for the purpose of picking up Minor. Father did not attempt to contact Mother until November 2001 because he wasn't really sure whether or not he could do anything about her refusal to allow contact with Minor. He tried to contact attorneys regarding his rights during the period from 1998 to 2000, but "no one talks -- really talks to you unless you have the money for them to talk to you." During 1998 to 2000, Father did not have the financial resources to obtain legal representation.

Father did not dispute that he did not make any child support payments from mid 1999 to November 2001, even though he worked for part of 2000. He stated he stopped the child support because he thought that was the only way he could force Mother to allow him to see Minor.

Father contacted Mother several times during the latter part of 2001.

In November 2001 he contacted her about the child support case she had filed with the district attorney's office and also because he wanted to see Minor. Mother brought up the possibility of Father signing an agreement to terminate his parental rights. She said if Father signed away his rights, she would waive the child support, but otherwise there was nothing Father could do about it anyway. Father told Mother the only way he would agree to terminate his parental rights was if he were allowed to speak to Minor and know his feelings.

Father filed the police report in November 2001 after he spoke with Mother and asked for her current address and she refused to give it to him. He did not file papers in court seeking enforcement of his visitation rights before November 2001 because he was not aware he could do so.

Father acknowledged he had agreed to meet Mother in November and cancelled the meeting. He testified he agreed to meet in order to locate Mother for service of paperwork, not to sign an agreement giving up his parental rights. Father faxed Mother a document in December 2001 regarding waiver of child support in return for Father consenting to termination of parental rights. Father testified he told Mother he would sign the documents terminating his parental rights in order to gain access to her.

D. *Probation Officer's Reports*

Pursuant to section 7851, the probation officer assigned to the case submitted two reports to the court.[6] In the first report, filed April 18, 2002, the officer stated the criteria of section 7822 had been met and Father's parental rights could be terminated. However, because she had not yet interviewed Father, the officer recommended the matter be continued.

The probation officer's second report was filed May 29, 2002, by which time she had interviewed Father. The officer concluded, "[I]t is clear that [Father] has attempted to remain in his son's life. Although the attempts have been neither consistent nor sustained, it is also clear that his attempts have been hampered. . . . [¶] This writer will recommend that the petition be denied and the matter referred to the Family Court for consideration of mediation with regard to visitation."

E. *Trial Court Ruling*

After hearing the evidence, the court stated: "Clearly there were periods of at least a year without any provision for the child's support, and during at least some of that period of time [Father] was capable of providing that support. There were periods of at least a year without communication from [Father]." The court also stated: "I think it is a

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[6] Section 7851 provides in relevant part: "(a) The juvenile probation officer . . . shall render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best

[footnote continued on next page]

correct statement that the drug testing is not a condition to visitation. . . . Consequently, it seems to me that there was an unwarranted restriction on [Father's] contact with his son or visitation with his son."

The court concluded: ". . . I think [Father] can clearly be faulted for the vigor with which he pursued visitation. And certainly his willingness at some point to bargain away his child support obligation for his right to consent to adoption is some indication of his -- of his intent to abandon; however, if I'm not mistaken, the standard is clear and convincing evidence, and I do not find clear and convincing evidence of intent to abandon. For that reason the petition is denied."

II

DISCUSSION

A. *Standard of Review*

As relevant here, section 7822 provides that a proceeding to declare a minor free from the custody and control of a parent "may be brought where the child has been left . . . by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent . . . with the intent on the part of the parent . . . to abandon the child." (§ 7822,

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[footnote continued from previous page]

interest of the child. [¶] . . . [¶] (d) The court shall receive the report in evidence and shall read and consider its contents in rendering the court's judgment."

subd. (a).) Section 7822 further provides: "The failure to . . . provide support, or failure to communicate is presumptive evidence of the intent to abandon." (§ 7822, subd. (b).)

For purposes of section 7822, "[t]he issue of abandonment is one of fact governed on appeal by the substantial evidence rule. Thus, '[a]ll evidence most favorable to the respondents must be accepted as true and that which is unfavorable discarded as not having sufficient verity to be accepted by the trier of fact.' [Citations.]" (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.)

A finding of intent to abandon under section 7822 must be supported by clear and convincing evidence. (§ 7821; see also *In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423 [clear and convincing evidence required under the predecessor to section 7822, former Civ. Code, § 232; *In re Angelia P.* (1981) 28 Cal.3d 908, 919 [same].) "'Clear and convincing' evidence requires a finding of high probability." (*Angelia P.*, at p. 919.) The evidence must be """so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind."' [Citation.]" (*Ibid*.)

B. *Burden of Proof*

There was no dispute Father did not communicate with or support Minor for more than a year. Hence, as the parties and court recognized, the issue was whether Father intended to abandon Minor.

As noted, section 7822 provides that a parent's failure to support or communicate with a child "is presumptive evidence of the intent to abandon." Stepfather contends that, in view of the evidence that Father failed to support or communicate with Minor, section

7822 required the court to shift the burden of proof to Father to rebut the presumption of intent to abandon.

The predecessor to section 7822, former Civil Code section 232, similarly provided that failure to support or communicate was "presumptive evidence of the intent to abandon." (See *In re Cynthia K.* (1977) 75 Cal.App.3d 81, 83, fn. 1.) In *In re Rose G.* (1976) 57 Cal.App.3d 406, the court held that former Civil Code section 232 created a presumption of intent to abandon. However, the court concluded the presumption "should be classified as a presumption that affects the burden of producing evidence" rather than a presumption affecting the burden of proof. Therefore, all that was required to rebut the presumption was that the parent introduce evidence of lack of intent to abandon. The burden of proof did not shift to the parent, but remained on the party claiming abandonment. (*Rose G.*, at p. 420; see Evid. Code, §§ 604, 606.)

The *Rose G.* court reasoned: "Considering the importance of the opposing interests in such hearings . . . , it would appear appropriate for the burden of proof to remain with the petitioner in [Civil Code] section 232 proceedings, i.e., with the party seeking to terminate the parent-child relationship." (*In re Rose G., supra,* 57 Cal.App.3d at p. 420.) The court reached that conclusion notwithstanding the fact it concluded the standard of proof on the issue of intent to abandon was proof by a preponderance of the evidence. (*Ibid.*) As explained *ante*, subsequent decisions and section 7821 establish that, in fact, clear and convincing evidence of intent to abandon is required before parental rights can be terminated. (See part II.A., *ante*.)

However, the fact the *Rose G.* court applied the wrong standard of proof does not undermine its conclusion that the presumption of intent to abandon should affect only the burden of producing evidence. In fact, the recognition that clear and convincing evidence is required actually supports the conclusion in *Rose G.* It would be anomalous to require the party claiming intent to abandon to produce proof by clear and convincing evidence, but yet permit the burden of proof to be shifted to the opposing party based on a mere showing of lack of communication or support.

Accordingly, Father in this case could rebut the presumption by introducing evidence sufficient to support a finding of lack of intent to abandon. (Evid. Code, § 604.) The burden of proof on the issue remained with Stepfather.

C. *Analysis*

The remaining question is whether Stepfather sustained his burden of proving Father intended to abandon Minor. In addressing that question, we first note that the requirement of proof by clear and convincing evidence stems from a recognition that "grave consequences flow from the permanent severance of the parent-child relationship." (*In re Angelia P.*, *supra*, 28 Cal.3d 908, 915.) "[T]he very essence of the proceeding is the complete and final legal termination of a relationship which is biological in nature and most personal in form. [Citations.]" (*Id.* at pp. 915-916.) " . . . 'Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood.'" (*Id.* at p. 916, quoting *In re Carmaleta B.* (1978) 21 Cal.3d 482, 489.) Thus, doubts about the intent of a parent to abandon a child should be resolved in favor of preserving parental rights.

"'Intent to abandon, as in other areas, may be found on the basis of an objective measurement of conduct, as opposed to stated desire.' [Citation.]" (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 550.) "In determining a parent's intent to abandon, the trial court may consider not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of the effort under all the circumstances [citation], as well as the quality of the communication that occurs [citation]." (*In re B. J. B.* (1986) 185 Cal.App.3d 1201, 1212.)

Father's efforts to reestablish contact with Minor from the end of 1998 until the end of 2001 were minimal if he was serious about reuniting with his son as he claimed. Other than the meeting at the restaurant in November 1999 and the drug test in May 2000, it appears Father did little, if anything, from November 1998 to November 2001 to try to reestablish visitation. Mother resided continuously in Riverside since the dissolution. Father resided in Orange County during most or all of that time. Father does not contend geographical separation prevented him from maintaining contact with Minor.

On the other hand, there was substantial evidence that Mother's failure to comply with the dissolution judgment in at least several respects may have compromised Father's ability to reunify with Minor. The judgment required each parent to apprise the other of his or her residence address, yet Mother admittedly failed to divulge her address when she moved in April 2001. The judgment required Mother to pay for drug testing she requested, yet according to Father, Mother refused to pay for the test in May 2000, and he had to obtain the test at his own expense. The judgment gave Father a right to visitation with and open telephonic access to Minor, which right was not, insofar as the

judgment stated, conditioned on drug testing. Yet according to Father, Mother denied him both physical and telephonic contact. Mother did not contradict Father's allegations that she had refused to divulge her address, refused to pay for the drug test in 2000, and refused to allow phone contact and visitation. Even if Mother had contradicted those allegations, the court would have been free to credit Father's testimony in the event of a conflict.

Stepfather contends the fact Father discussed the relinquishment of his parental rights if Mother would waive child support established Father's intent to abandon Minor. However, those discussions did not occur, even according to Mother's testimony, until November 2001. By that time, Father was taking actions which were plainly inconsistent with an intent to abandon, such as filing a police report alleging Mother had violated his right of visitation and filing an order to show cause to remove the drug-testing requirement. Moreover, the evidence was ambiguous as to whether Father actually intended to give up his rights or merely indicated he would do so in order to obtain access to Mother to serve her with court documents, as he claimed. In any event, Father never signed a waiver agreement.

Stepfather also stresses the fact that, to justify termination of parental rights, it is not necessary to show the parent had a permanent intent to abandon, but only that he or she had that intent for at least the statutory period of one year. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 884-885.) The evidence in this case might have justified the court in concluding there was a period of at least a year from May 2000, when Father got the drug test, to November 2001, when he went to the police to try to enforce visitation, during

which Father lost interest in trying to reunite with Minor. However, the evidence did not compel that conclusion. Father testified his lack of action was attributable to the fact he was unaware he could enforce his right to visitation until his new wife started researching the matter, not to a lack of desire to reunite with Minor. Until the end of 2001, according to Father, he "thought just because [Mother] didn't want to, that she didn't have to" allow him visitation.

Where the standard of proof in the trial court is clear and convincing evidence, the reviewing court must "bear in mind the heightened burden of proof" in assessing whether there is substantial evidence to support the trial court's ruling. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.) We cannot say in this case that the evidence compelled a finding of clear and convincing evidence of intent to abandon. Accordingly, we affirm the trial court's order.

III

DISPOSITION

The order appealed from is affirmed. No costs are awarded in this proceeding.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

WARD
J.